(1) Supreme Court, U.S.
FILED
JUL - 6 2000
OFFICE OF THE CLERK

No. 00-217

# In the Supreme Court of the United States

SAMUEL L. LIEBER, M.D.
Plaintiff - Petitioner

vs.

CADDO LEVEE DISTRICT
BOARD OF COMMISSIONERS, ET AL.
Defendants - Respondents

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF LOUISIANA

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## PETITION FOR WRIT OF CERTIORARI

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*pro se*

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27pp

## QUESTIONS PRESENTED FOR REVIEW

1. Does not use of La. C.C. Art. 2030 mandate use of C. C. Art. 2033 only to effect the judgment of C. C. Art.2032?

   Can use of C. C. Art. 2033 be avoided unconstitutionally?

2. Can obviously inapplicable law constitutionally be allowed to apply (La. R.S. 13:5111, 19:14)? This is, - is use of wrong law an ill practice (particularly if it causes irreparable harm to Petitioner)?

3. Can any judge constitutionally rewrite and change the meaning - intent of a statute? - - which change voids the statute's meaning - intent?

4. Can any judge refuse to address (ignore) any statues whether or not presented? See Code of Evidence 202, La. C. C. P. Art. 2005, C.C. Art. 7, 12, 1968, 3477.

5. Can any judge refuse to address presented specific questions of fact or law, the answer to which would reverse any judge's prior answers?

6. Does not a judgment's reversal prevent irreparable harm to one to be affected by such judgment?

   i. e., is not a reversed judgment an ill act?

## LIST OF ALL PARTIES TO PROCEEDING AND REQUEST FOR ORDER MANDATING REBUTTAL BRIEFS

The parties to this proceeding are:
Samuel L. Lieber, M.D., Petitioner, *pro se*.
The Louisiana Department of Highways, represented by its counsel, Mr. Ronald J. Bertrand.
Through the nature of the errors alleged by Petitioner regarding the actions of the State Courts in this matter, each State Court District and Appellate Judge is, in effect, a party to this proceeding:

State District Judge Frank H. Thaxton, III, of the First Judicial District Court.

State Appellate Judges Harmon Drew, Jr., Henry N. Brown, Jr., and Charles B. Peatross of the Second Circuit Court of Appeal.

Courtesy copies will be provided to the applicable Justices of the Louisiana Supreme Court.

Petitioner most respectfully requests that the Supreme Court Justices mandate a rebuttal brief from each involved State Judge, - - in order to have their written reasoning regarding these questions which have been presented to you and to them, - - yet remain unanswered! - -an obvious denial of substantive due process.

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# CHRONOLOGY

**Original Suit for Declaratory Judgment and Damages**

Partial Summary Judgment declaring 1953 Right of Way Deed to Louisiana Highway Department void *ab initio*:

Lieber v. Caddo Levee District Board of Commissioners, 27,267 (La. App. 2d Cir. 8/23/95), 660 So.2d 188, writ denied, 95-2355 (La. 12/8/95), 664 So.2d 427.

Claim for Damages denied through Exception of Prescription filed by Louisiana Department of Transportation and Development:

Lieber v. State, Department of Transportation and Development, 28,745 (La. App. 2d Cir. 10/30/96), 682 So.2d 1257, writ denied, 97-0087 (La. 3/7/97), 689 So.2d 1374, reconsideration denied, 97-0087 (La. 4/18/97), 692 So.2d 431.

**Suit for Nullity filed by Plaintiff/Petitioner *pro se*:**

Lieber v. Caddo Levee District Board of Commissioners, 32,551, 32,552 (La. App. 2d Cir. 12/8/99), 748 So.2d 587, writ denied.

Plaintiff/Petitioner raised the issues of denial of due process (procedural and substantive) and denial of equal protection on page 9 of his Petition. These issues were not addressed by either the State District Court of Court of Appeal.

## PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE UNITED STATES

**Petitioner has been Denied Fundamental Fairness and Basic Justice through the State Courts' deliberate use of Wrong Law and the continued Refusal of these Courts to correct their Error**

A Writ of Certiorari should be granted in this case as an extraordinary remedy to correct a serious violation of Plaintiff/Petitioner's rights of substantive due process in what must be construed as the deliberate maladministration of justice in this case through misapplication of law; namely, the State Courts' use of wrong laws and their refusal to correct or even address their errors. The final decision of the State Courts in denying Petitioner's right to pursue his suit for relative nullity must be reversed because the State Courts repetitively refused to address a statute raised as an assignment of error in a prior adjudication of Petitioner's property rights claim, which, if addressed, would have changed the outcome of the case. Clearly, this has violated Petitioner's due process rights, and can only be remedied by this Court's intervention.

Petitioner has shown through his suit for relative nullity that a State Court decision in his previous action for damages for the State of Louisiana's illegal withholding of his valuable real estate from 1953 until 1995 should be voided because, *inter alia*, the Court had refused to address Petitioner's assignment of error in the earlier lawsuit that application of La. C.C. Art. 2032 would have made plaintiff s claim for damages imprescriptable. Instead, by ignoring this law, the State Courts found Petitioner's claim for damages to have prescribed. With the final decision of the

Louisiana Supreme Court denying Petitioner's Application for Writs of Certiorari or Review in Petitioner's subsequent suit for nullity, the State Courts have upheld the granting of an exception of no cause of action filed by Defendant-Respondent, Louisiana Department of Transportation and Development, dismissing Petitioner's action for nullity.

The State Courts compounded their errors by also ignoring a res judicata finding in the previous lawsuit that the State's basis for claiming any right to petitioner's property was void *ab initio.* The courts found that "the State's acquisition of a servitude [in 1953 on plaintiff's property at Youree Drive and Kings Highway in Shreveport] for this limited-access highway project clearly violated former R.S. 48:312 . . ." Accordingly, as required by law, the Courts applied La. C.C. Art. 2030, declaring the servitude agreement to be absolute null. However, despite this res judicata ruling, in a subsequent proceeding for damages the same State Courts ruled that Petitioner's claim for damages against the State had prescribed via erroneous application of statues that cannot apply (La. R.S. 13:5111 and La. R.S. 19:14). This subsequent ruling was a deliberate and direct refusal to apply state law, specifically La. C.C. Art. 2032, which declares that a suit for damages arising from an absolutely null contract does not prescribe - - then refusing to apply La. C.C. Art. 2033, the statute effecting La. C.C. Art. 2030! If C.C. Art. 2030 is applied, then C.C. Art. 2033 must follow to effect 2030! This was not done!

Plaintiff specified this refusal to apply correct law as error to the Louisiana intermediate court of appeal, as follows:

"Given the finality of the judgment that the 1953

> right-of-way is absolutely null, the Trial Court manifestly erred through its ruling on prescription in denying damages to Plaintiff as an effect of this finding under La. C.C. Art. 2033."

However, the intermediate Appellate Court totally ignored, and refused to address, this specification of error, even though application of La. C.C. Art. 2033 was required, and La. C.C. Art. 2032 makes Plaintiff's claim for damages imprescriptable. Writs subsequently were denied by the Louisiana Supreme Court.

Accordingly, Petitioner timely filed his petition for nullity to declare that the prior State Court action in deliberately ignoring a key statute was a vice of substance and ill practice under La. C.C.P. art. 2001 et seq. However, the merits of Petitioner's claim have not been addressed due to the dismissal of Petitioner's suit by the State Courts' granting of the State of Louisiana's exception of no cause of action. This is in violation of the previous res judicata ruling that La. C. C. Art. 2030 applies, which requires that the Courts apply La. C. C. Art. 2033. The deliberate failure to apply correct law is the same as if Petitioner's claim is deliberately being prevented from assertion at all.

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[1] La. C. C. Art. 2033 provides, in pertinent part:

> "An absolutely null contract, or a relatively null contract that has been declared by the court, is deemed never to have existed. The parties must be restored to the situation that existed before the contract was made. If it is impossible or impracticable to make restoration in kind, it may be made through an award of damages."

Accordingly, Petitioner seeks fundamental fairness and basic justice from this Honorable Court, because:

1 Use of wrong law = an obvious ill practice.

2. Refusal to change use of wrong law = bias and denial of fundamental fairness. (If a judge refuses to defend his use of allegedly wrong law, it shows bias and a denial of a right to a fair hearing.)

3. A court ruling that a suit for nullity cannot apply to legal errors in a prior proceeding ignores the fact that a reversal (= nullity) by an appellate court of a junior court = a finding of the use of wrong law by the court reversed.

These actions by the State Courts are in violation of Petitioner's rights to substantive due process and must be reversed.

**1. These decisions are in direct conflict with those of other controlling Louisiana Court decisions.**

In Morehead v. Ford Motor Co., 30,207 (La. App. 2d Cir. 2/25/98), 709 So. 2d 861, the Louisiana Second Circuit Court of Appeals held that an "ill practice" is "any improper practice or procedure which operates, even innocently, to deprive a litigant of some legal right." (Emphasis added.) However, through its ruling in this case, the Second Circuit Court of Appeals has excluded from this broad definition the actions of a prior court in refusing to consider law raised through assignment of error which is critical to the resolution of the case.

**2. The Louisiana Supreme Court has left unresolved a significant issue of law that must be resolved.**

The Louisiana Second Circuit Court of Appeals ruled in this case, "A court's consideration of the law, even if done erroneously, can in no way be construed as an 'ill practice.'" There is no legal foundation given for this sweeping statement, which should be resolved by this Court. Petitioner asks: Is not any judgment an "ill practice" on the part of the court reversed?

**3. The State Court decisions erroneously interpret Louisiana law so as to cause material injustice and significantly affect the public interest.**

The Second Circuit Court of Appeals misinterpreted and misapplied not only La. C.C.P. art. 2001 and 2004 as to what constitutes a vice of substance and an ill practice, but also La. C.C.P. 2005 through a grievously **wrong** statement of the statute itself! (It is unconstitutional for a judge to change the wording - intent of legislation!)

C.C.P.2005 provides that a judgment which has been rendered by an appellate court may be annulled when the ground for nullity (a.) did not appear in the record of appeal, or (b.) was not considered by the appellate court. The Second Circuit erroneously misstated the statute by saying that C.C.P. 2005 "simply precludes annulment of a judgment when the ground for nullity appeared in the record of appeal **or was considered by the trial court**." This simply is wrong. Instead, Petitioner has shown that his stated ground

for nullity, the failure of the prior Appellate Court to apply C.C. 2033, comes squarely within the second basis of 2005 because 2033 was not considered by the Appellate Court, both in the original appeal as well as by denial of rehearing.

Further, La. C.C. Art. 3477, permitted in Petitioner's Suit for Nullity via Code of Evidence Art. 202 though never appearing in the record of this case, nulls the servitude granted by the previous ruling of the Second Circuit Court of Appeal. Finally, Code of Evidence 202, and La. C.C. Arts. 7, 11, 12, and 1968 force the same conclusions, yet never were formally introduced by Plaintiff, Defendant, or the Courts, until Plaintiff's suit for nullity (permitted by La. C.C.P. Art. 2005 and Code of Evidence Art. 202).

**4. The State Courts' decisions grossly depart from proper judicial proceedings**

By its ruling, the Second Circuit Court of Appeals ignored controlling law not once, but twice, thereby resulting in gross injustice to plaintiff. Petitioner's rights to substantive due process have been violated, which must take precedence over any unstated interest in the "finality" of an erroneous judicial decision.

## STATEMENT OF THE CASE

### Facts

In 1953, the Louisiana Department of Highways acquired numerous parcels of land for the construction of Youree Drive Extension (La. Hwy. 1) in Shreveport, Louisiana. The Department of Highways was predecessor to the Louisiana Department of Transportation and

Development (DOTD), Defendant. DOTD admitted, and the Trial Court and Court of Appeal concurred, that Youree Drive Extension is a limited access highway, a special "class" of road.

Philip Lieber, father and predecessor in title to Plaintiff, Samuel L. Lieber, M. D., owned a 2.09-acre parcel of land at the intersection of Kings Highway and the planned Youree Drive Extension. The Department of Highways acquired only a right of way over the subject Lieber property, refusing to purchase fee title.

DOTD acquired the subject property through an invalid 1953 right of way deed by the Defendant, the Louisiana Department of Transportation and Development (DOTD), successor to the Louisiana Department of Highways, of a valuable 2.09-acre tract of land belonging to Plaintiff, Samuel L. Lieber, M.D., located at the intersection of Youree Drive Extension (La. Hwy. 1) and Kings Highway in Shreveport, Louisiana. The entire 2.09-acre tract was taken and held for what Defendant consistently claimed were highway purposes, although only a portion was paved for La. Hwy. 1. Plaintiffs property is valuable because it is located at one of the most heavily traveled commercial intersections in Shreveport. Plaintiff originally filed suit in 1982 (to prevent 30-year acquisitive prescription), amended in 1985 to challenge the validity of DOTD's acquisition of the right of way. The Trial Court eventually in 1994 rendered partial summary judgment holding that the act obtaining the subject property was absolutely null ab initio. (Opinion of Trial Court on Partial Summary Judgment rendered March 30, 1994.) The Second Circuit Court of Appeal affirmed in the following terms:

"The trial court declared the right-of-way deed null and void on the basis of LSA-C.C. Art. 2030, which declares a contract absolutely null when it violates a rule of public order and provides that such a contract cannot be confirmed. . . Courts have interpreted the prohibition against contracts 'contrary to public order' as including a violation of a state statute. *Wynne v. New Orleans Clerks and Checkers Union, Local 1497, International Longshoremen's Association, AFL-CIO*, 550 So. 2d 1352 (La. App. 4th Cir. 1989), writ denied, 558 So.2d 1125 (La. 1990). **Furthermore, according to LSA-C.C. Art. 2032, an action for annulment of an absolutely null contract does not prescribe.**

Therefore, we find no error on the part of the trial court in declaring the contract null and void. See *Johnson v. Kilpatrick*, 569 So.2d 669 (La. App. 2d Cir. 1990)." (Emphasis added.)

Trial on the merits of the case was held in October, 1995, while DOTD's writ application challenging the Court of Appeal ruling that its acquisition was absolutely null was still pending. The Louisiana Supreme Court finalized the absolute nullity in December, 1995! The Trial Court held in November, 1995, and the Second Circuit Court of Appeal subsequently affirmed in October, 1996, that the Plaintiff's action in damages had prescribed. Note that a writ was denied by the Louisiana Supreme Court on this issue **after** its prior judgment of December, 1995 of absolute nullity of a servitude via La. C.C. Art. 2030, to be effected by La. C.C. Art. 2033, thus making the later judgment of prescription null! The District Court relied upon La.R.S. 13:5111, changed by the Appeal Court to R.S. 19:14, both inapplica-

ble! Writs subsequently were denied by the Louisiana Supreme Court. Further, the Louisiana Supreme Court erroneously denied writs appealing the error of use of R.S. 19:14 rather than C.C. Art. 2033, due to the res judicata effect of the adjudication of December, 1995, that C.C. Art. 2030 held - - which mandates its effect via C.C. Art. 2033!

Plaintiff subsequently and timely filed a petition for nullity, alleging that the failure of the Appellate Court to even address the application of La. C.C. Art. 2033 was a vice of substance which justice requires be annulled. (C.C.P. 2005, etc.)

In Plaintiff's Original Brief filed with the Second Circuit Court of Appeal on March 18, 1996, it was specified as error and argued at pp. 18-19:

> **" 2. The Trial court manifestly erred, through its ruling on prescription, in denying damages to Plaintiff as an effect of the finding that the 1953 Right-of-Way Agreement was absolutely null.**
>
> Given the finality of the judgment that the 1953 right-of-way is absolutely null, the Trial Court manifestly erred through its ruling on prescription in denying damages to Plaintiff as an effect of this finding, under La. C. C. Art. 2033.
>
> La. C. C. Art. 2033 provides, in pertinent part:
>
> 'An absolutely null contract, or a relatively null contract that has been declared null by the court, is deemed never to have existed. The parties must be restored to the situation that existed before the con-

> tract was made. **If it is impossible or impracticable to make restoration in kind, it may be made through an award of damages.**' (Emphasis added.)"

However, the Second Circuit Court of Appeal, in its Opinion and Judgment rendered on October 30, 1996, did not address this specification of error under Civil Code Article 2033. Plaintiff shows that his property has not been restored and that to do so would be impracticable, at best. Louisiana Highway 1 rests on top of a significant portion of Plaintiffs property. While not impossible to have the highway relocated, and the mound of dirt for the abandoned levee restored, it certainly would be enormously expensive for the State to achieve what the law requires because of the illegal actions of the Highway Department in its method of acquiring control over the Lieber property.

What the law calls for, instead, in this situation is damages. Such an action **does not prescribe**. Civil Code Article 2032.

Civil Code Article 2033, by its very wording, must control over the St. Julien doctrine. (St. Julien cannot apply!) Art. 2033 provides that upon a finding of nullity, "the contract is deemed never to have existed." All of DOTD's claims to the Lieber property under color of law were made under the 1953 right of way agreement - consistently maintained by DOTD until the Louisiana Supreme Court denied writs in December, 1995. With the right of way contract being declared to be null *ab initio*, all rights claimed by the State fell with it.

Errors by State Courts

I. AS A MATTER OF LAW THE COURT OF APPEAL ERRED IN REFUSING TO FIND THAT GROUNDS FOR NULLITY ARE TO BE INTERPRETED BROADLY, INCLUDING IMPROPER ACTION ON THE PART OF THE PRIOR COURTS IN REFUSING TO CONSIDER AND ADDRESS PERTINENT LAW SPECIFIED IN ASSIGNMENT OF ERROR

II. AS A MATTER OF LAW THE OPINION AND JUDGMENT OF THE SECOND CIRCUIT COURT OF APPEAL DELIBERATELY MISSTATES LA. C.C.P. ART. 2005 AS TO WHEN AN APPELLATE COURT DECISION MAY BE ANNULLED; IT CHANGES THE MEANING AND IS UNCONSTITUTIONAL!

III. AS A MATTER OF LAW THE PRIOR APPELLATE COURT'S DECISION SHOULD BE ANNULLED FOR IMPOSING A ST. JULIEN SERVITUDE ON PLAINTIFF'S PROPERTY ON APPEAL WHEN NONE HAD BEEN REQUESTED OR RULED UPON BY THE TRIAL COURT; AND SUCH SERVITUDE CANNOT LEGALLY APPLY! ST. JULIEN CAN APPLY IF NO PAYMENT FOR THE SERVITUDE HAS BEEN MADE - - PAYMENT HAD BEEN MADE!

IV. AS A MATTER OF LAW, THE COURT OF APPEAL ERRED IN FINDING THAT IT WAS NOT JUDICIAL ILL PRACTICE FOR THE PRIOR COURTS TO TAKE JUDICIAL NOTICE OF DOTD'S STATUS AS A PRECARIOUS POSSESSOR UNDER LA. C.C. ART. 3477 WHICH, IF ACKNOWLEDGED, WOULD HAVE DEFEATED DEFENDANT'S AWARD OF A ST.

JULIEN SERVITUDE (OR ANY SERVITUDE)!

**I AS A MATTER OF LAW THE COURT OF APPEAL ERRED IN REFUSING TO FIND THAT GROUNDS FOR NULLITY ARE TO BE INTERPRETED BROADLY, INCLUDING IMPROPER ACTION ON THE PART OF THE PRIOR COURTS IN REFUSING TO CONSIDER AND ADDRESS PERTINENT LAW SPECIFIED IN ASSIGNMENT OF ERROR**

The Second Circuit Court of Appeal ruled, "A judgment cannot be annulled merely for being legally wrong. The correctness of the judgment must be questioned on appeal." (Not true, as noted in La. C.C.P. Arts. 2001, 2004, and 2005!) However, putting aside this statement as a possible acknowledgment on the part of the present panel of the Appellate Court that the prior panel was wrong in failing to apply La. C.C. Art. 2033, the conclusion is wrong as a matter of law in overlooking a significant change in statute and in misinterpreting the judicial precedents cited.

The Statute governing an action for nullity, La. C.C.P. Art. 2004, was changed in 1960 to broaden the definition of an "ill practice" giving rise to the action. Formerly, Code of Practice Art. 607 required the "Ill practice" to be on the part of the party in whose favor the judgment at issue was rendered. However, this limitation is not contained in the Art. 2004.

Instead, C.C.P. art. 2004 is broad enough to require a judgment to be annulled when there is any ill practice on the part of **anyone** involved in granting of the judgment, including the court. The broadening the definition of "ill

practice" through adoption of C.C.P. art. 2004 "was deliberate." St. Mary v. St. Mary, 175 So.2d 893 (La. App. 3rd Cir. 1965).

Even under the interpretation of the previous statute, an ill practice requiring a prior judgment to be annulled can be misapplication of law by the court. Vegas v. Cheramie, 80 So.2d 880 (La. App. 1st Cir. 1955), writ denied. This conclusion is consistent with the ruling of the Second Circuit Court of Appeal itself, that an "ill practice" is "any improper practice or procedure which operates, even innocently, to deprive a litigant of some legal right." Morehead v. Ford Motor Co., 30,207 (La. App. 2d Cir. 2/25/98), 709 So. 2d 861. This statement by the Second Circuit is itself consistent with the ruling of this Supreme Court in Johnson v. Jones-Journet, 320 So.2d 533 (La. 1975), that:

> " . . . the jurisprudence set forth two criteria to determine whether a judgment had, in fact, been obtained by actionable fraud or ill practices: (1) the circumstances under which the judgment was rendered showed the deprivation of legal rights of the litigant seeking relief, and (2) the enforcement of the judgment would have been unconscionable and inequitable."

320 So. 2d 533 at 537.

The legal right of which plaintiff has been deprived in this case is substantive due process, guaranteed under both the federal and state constitutions. This right of due process has been denied by the refusal and failure of the courts, specifically the prior panel of the Second Circuit Court of Appeal as complained of by plaintiff, to have a

assignment of error addressed and correct statutes applied. This right of due process must override any unstated interest in "finality" of a judgment without legal foundation. The reason is that refusal to consider proper law cannot be "a thing adjudicated" when it was not adjudicated.

## II AS A MATTER OF LAW THE OPINION AND JUDGMENT OF THE SECOND CIRCUIT COURT OF APPEAL MISSTATES LA. C.C.P. ART. 2005 AS TO WHEN AN APPELLATE COURT DECISION MAY BE ANNULLED.

By restating La. C.C.P. art. 2005 on page 6 of its opinion, the Appellate Court changed its meaning to something not intended by the People through their Legislature! The article reads, in pertinent part:

> "A judgment ... rendered by an appellate court may be annulled only when the ground for nullity did not appear in the record of appeal or was not considered by the appellate court."

The Second Circuit Court of Appeal, however, at page 6 of its opinion, attempts to reverse the meaning by saying:

> ". . . [La. C.C.P. art. 2005] precludes annulment of a judgment when the ground for nullity appeared in the record of appeal or was considered by the trial court."

This restatement is erroneous in two ways. First is the apparent typo in saying "trial court" when the article deals with decisions by an appellate court. Second, the

restatement is misleading in that it implies something the article does not by its plain meaning. The article states that a judgment rendered by an appellate court may be annulled when the ground for nullity either(1.) did not appear in the record of appeal, or (2.) if the ground for nullity did appear in the record, it was not considered by the appellate court.

It is plaintiffs position that under a correct statement of C.C.P. Art. 2005, he has shown that his arguments meet both tests. As to the failure of the prior appellate court to apply C.C. Art. 2033, while the "ground for nullity" appeared in the record of prior appeal through plaintiff's specification of error, it clearly was not considered or addressed by the appellate court because it was not mentioned by the appellate Court at all, - - but ignored!

**III AS A MATTER OF LAW THE PRIOR APPELLATE COURT'S DECISION SHOULD BE ANNULLED FOR IMPOSING A ST. JULIEN SERVITUDE ON PLAINTIFF'S PROPERTY ON APPEAL WHEN NONE HAD BEEN REQUESTED OR RULED UPON BY THE TRIAL COURT, NOTING THAT THE APPELLATE COURT REFUSED REHEARING; THUS DENYING PLAINTIFF SUBSTANTIVE DUE PROCESS, - - A CHANCE TO ARGUE THE POINT!**

Plaintiff suffered a violation of substantive due process by the imposition of the prior appellate court of a St. Julien servitude over the roadway portion of La. Highway 1 crossing his property when no such servitude had been requested or ruled upon by the trial court, and is illegal -- because payment for the servitude had been made to property owner by the highway department, and the St Julien

doctrine applied only when Payment has not been made!

Appellate decisions should be, by their nature, limited to the facts and law contained in the pleadings before the court. In the prior appeal that is the subject of plaintiff's action for nullity, the trial court had ruled that while the right of way deed granted by plaintiff's father to the Louisiana Department of Highways was void, plaintiff's claim for damages had prescribed due to the illegal use of R.S. 13:5111!. This was the issue briefed and argued to the appellate court.

However, when the Second Circuit Court of Appeal issued its opinion upholding the trial court, the appellate court had added on its own a ruling that the Louisiana Department of Transportation and Development was entitled to a St. Julien servitude over the roadway portion of Louisiana Highway 1 crossing plaintiff's property. This cannot hold legally!

The imposition was contrary to law because plaintiff-appellant's father was paid for the servitude. Therefore, by its terms, the St. Julien doctrine, which applies only if no payment is made, cannot apply! See R.S. 19:14, 13:5111.

Moreover, the St. Julien doctrine "requires a consent or acquiescence by the landowner to the taking of the property without expropriation proceedings." Howard v. Louisiana Power & Light Company, 583 So. 2d 503 at 508, 509-510 (La. App. 5th Cir. 1991). Further, both R. S. 13:5111 and the St. Julien doctrine require good faith taking. Howard v. Louisiana Power & Light Company, supra; Jungeblut v. Parish of Jefferson, 485 So. 2d 974 at 977 (La. App. 5th Cir. 1986). Plaintiff had shown that the record

evidence of the prior action requires only one reasonable conclusion of the State's actions in this case: bad faith, demanding and paying less for a servitude when the Highway Department had recently successfully sued for mandating payment for fee title - - in the same highway system (property owned by the Bessie Barrow family)!

There could be no basis for consent or acquiescence, given the misrepresentations by the Department of Highways as to the legality of the original right of way deed and the continued misrepresentations of the Department of Highways and later, DOTD, concerning the necessity of retaining the subject Lieber pararoadbed property (that is, property adjoining the roadbed) for highway purposes. There could be no "concurrence of wills," necessary for consent, and no reasonable basis to acquire knowledge of the voidability of the right of way deed despite the State's knowledge of the illegality and bad faith failure to disclose. Under these facts, there could be no acquiescence to the State's actions.

Consider what plaintiff did not know Plaintiff did not know that the Highway Department/DOTD, despite its consistent misrepresentations that the entire property was needed for highway purposes, determined that it had lost any rights to the unpaved portion of the Lieber property through the running of liberative prescription. Plaintiff did not know of the Highway Department's consistent practice of expropriating properties for Youree Drive Extension in fee only, <u>although the Highway Department/DOTD did.</u> Plaintiff <u>did</u> know that the Highway Department allowed third party commercial use of the pararoadbed property, and objected to this excess taking, which the Highway Department ignored.

Plaintiff did not know that the St. Julien servitude issue was even to be considered by the Appellate Court, and had no opportunity to address the issue in oral or written argument.

This Honorable Court must consider the requirements of good faith and the consequences of fraud:

Civil Code Art. 1759: "Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation."

Civil Code Art. 1983: ". . . Contracts must be performed in good faith."

Civil Code Art. 1953: "Fraud is the misrepresentation or a Suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction."

Civil Code Art. 1954: "Fraud does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill. This exception does not apply when a relation of confidence has reasonably induced a party to rely on the other's assertions or representations." (And why should not a citizen trust the business activities of government personnel?)

For plaintiff to lose his valuable rights to compensation for the bad faith actions of the Highway Department/DOTD under the factual circumstances constitutes a denial of due process under Article 1, Sections 2 and

4, of the Louisiana Constitution.

Even with good faith on the part of the State employees, the judgment with its basis on C.C. Art. 2030 - - mandates the use of C.C. Art. 2033 to effect C.C. Art. 2030!

**IV AS A MATTER OF LAW, THE COURT OF APPEAL ERRED IN FINDING THAT IT WAS NOT JUDICIAL ILL PRACTICE FOR THE PRIOR COURTS TO TAKE JUDICIAL NOTICE OF DOTD'S STATUS AS A PRECARIOUS POSSESSOR UNDER LA. C.C. ART. 3477 WHICH, IF ACKNOWLEDGED, WOULD HAVE DEFEATED DEFENDANT'S AWARD OF A ST. JULIEN SERVITUDE**

The prior courts in this proceeding could and should have taken judicial notice under Art. 202 of the Code of Evidence that defendant held the status of a precarious possessor of plaintiff's property, given that defendant's occupation of the property was under a right of way deed that was not declared invalid until 1995. As a precarious possessor, defendant would be unable to acquire any rights by acquisitive prescription.

Since defendant, as a precarious possessor, was unable to acquire rights by acquisitive prescription, the Second Circuit Court of Appeal wrongfully awarded defendant a St. Julien servitude over the roadbed of Youree Drive. (The award of the St. Julien servitude was made, for the first time, in the opinion of the Second Circuit Court of Appeal in the appeal of plaintiff's case on damages and was not part of the Trial Court's decision on damages.) Again, given the timing of the award of the St. Julien servitude, plaintiff was

unable to even address the award except through an application for rehearing (denied) and application for writs to the Louisiana Supreme Court (denied) - no oral argument was ever allowed by this Honorable Court on its decision to award a St. Julien servitude.

Given that defendant was a precarious possessor, unable to benefit from any rights of acquisitive prescription, then the use of La. C. C. Art. 2030 -- and C. C. Art. 2033 - was mandated. The Court of Appeal erred in failing to find that it was judicial ill practice for the prior appellate court to fail to apply the law of precarious possession, via C.C. Art. 3477!

## CONCLUSION

Judges deny substantive due process when they refuse to permit further oral and written reasoning of previously presented facts through denying rehearings, thus refusing to consider certain valid arguments that nullify judgments!

Petitioner respectfully asks this Honorable Court to grant this petition for certiorari and grant petitioner the justice and fundamental fairness that petitioner has been so grievously denied through the actions of prior state courts, actions which must be nullified through the proper application of law, the solemn expression of legislative will.

These acts at each level of the State Courts are illegal and unconstitutional alterations of both State and Federal Statutes! There has been continuing use of procedural due process to DENY substantive due process! - - How often is it done? - - WHY?

Respectfully submitted,

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*pro se*